Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-459

J. NORTON HAAS, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOYCE HOLLEMAN
Attorney and Counsellor at Law
1913 Fifteenth Street
P. O. Drawer 1030
Gulfport, Mississippi 39501
Attorney for Petitioner

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was entered on October 29, 1976, the date the Notice of Appeal was filed, and not May 21, 1976, when an incorrect sentence was entered?

Did the United States District Court for the Southern District of Mississippi err by sentencing the Petitioner under the provisions of the Parole and Reorganization Act, 18 U.S.C. 4205(f), which became effective May 14, 1976, and which became effective after the commission of the offense, indictment and plea of the Petitioner in the United States District Court, and consequently, the sentence imposed has an ex post facto effect in violation of Article I, Section IX, Paragraph III of the Constitution of the United States?

Did the District Judge of the United States District Court for the Southern District of Mississippi err in specifying the particular place of confinement of the Petitioner in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States which guarantee due process and equal protection under the law?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section IX, Paragraph III

"No Bill of Attainder or ex post facto Law shall be passed."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Section 1

". . . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . . . ."

Statutes Involved

18 U.S.C. 4205(f)

"Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed the sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of Section 4164 (18 U.S.C. 4164). This sub-section shall not prevent delivery of any person released on parole to the authorities of any state otherwise entitled to his custody."

STATEMENT OF THE CASE

On March 19, 1975, an indictment was returned against the Petitioner by a federal grand jury alleging certain acts committed by him between October 1, 1971, and March 1, 1973. The Petitioner pled guilty to a lesser included offense under the indictment on April 5, 1976. On May 14, 1976, the Parole and Reorganization Act, 18 U.S.C. 4205(f) became effective. Seven days later, on May 21, 1976, the Petitioner was sentenced by the United States District Court for the Southern District of Mississippi, Judge William Harold Cox presiding.

At the time of sentencing, May 21, 1976, counsel for the Petitioner brought to the attention of the Court the adverse effect of the parole and Reorganization Act which became effective seven days before and that the sentencing order should indicate the Petitioner's eligibility for parole after serving one-third of his sentence, otherwise the Petitioner would be forced to serve the entire year sentence under the provisions of the Parole and Reorganization Act. The United States District Judge stated that it was the Court's intention that the Petitioner serve the full year.

The sentencing order on its face and by virtue of the statements of the Court reflect that in an ex post facto manner the Court has applied a new law which went into effect after the commission of the offense and the indictment and after the plea of the Petitioner.

Under the Parole and Reorganization Act, a sentence of not less than six months nor more than one year requires the service of the entire term unless the

Court which imposes the sentence at the time of sentencing provides for release as if on parole after service of one-third of such term. The District Court refused to clarify the sentencing order as requested by counsel for the Petitioner and applied the provisions of the Parole and Reorganization Act requiring service of a full year.

At the sentencing hearing on May 21, 1976, the District Court ordered the Petitioner imprisoned in the Hattiesburg, Mississippi jail, however, the sentencing order specified the Madison County, Mississippi jail as place of confinement. Counsel for the Petitioner recognized the discrepancy and filed a Motion to Defer, Correct or Reconsider Sentence which was considered on October 29, 1976 and the sentencing order corrected to show the confinement at the Forrest County Jail at Hattiesburg, Mississippi, in line with the Court's original oral ruling. The Notice of Appeal was filed on October 29, 1976, but incorrectly stated May 21, 1976 as the date of final sentencing when in fact the sentence was not final until October 29, 1976 when the sentencing order was corrected to reflect the Court's original intentions in regard to place of confinement for a full year.

An appeal was taken to the United States Court of Appeals for the Fifth Circuit which was denied because the Notice of Appeal incorrectly reflected the May 21, 1976 date as date of final judgment when in fact, the sentence was not final until it was corrected on October 29, 1976. The final judgment of the Court of Appeals was entered on August 24, 1977.

ARGUMENT

I.

The United States Court Of Appeals For The Fifth Circuit Erred In Dismissing The Petitioner's Appeal To That Court By Declaring The Notice Of Appeal Was Not Timely Filed And In Failing To Recognize The Final Judgment Of The United States District Court For The Southern District Of Mississippi In The Petitioner's Cause Was Entered On October 29, 1976, And Not May 21, 1976 When An Incorrect Sentence Was Entered On The Minutes Of The Court.

The United States Court of Appeals for the Fifth Circuit denied the Petitioner's appeal, stating that the appeal was not timely filed because the date of May 21, 1976, appeared on the date of the Notice of Appeal filed with that Court. The Court of Appeals for the Fifth Circuit did not recognize that by inadvertence an incorrect date of final sentencing, that is the May 21, 1976, date was placed on the Notice of Appeal. In this case, the Petitioner's sentence was not final on May 21, 1976, because there was a substantial conflict on what the United States District Judge said at the sentencing hearing in regard to what the sentence would be and what sentence actually appeared on the written sentencing order filed in the Court below.

At the sentencing hearing, the United States District Judge sentenced the Petitioner to a one year sentence and a $1,000.00 fine. The one year sentence was to be served in the Forrest County Mississippi Jail. Upon examination of the sentencing order, counsel for the

Petitioner recognized that the order provided that the petitioner be confined at the Madison County, Mississippi, jail for a period of one year, and Petitioner's counsel filed his Motion to Defer, Correct or Reconsider sentencing which was considered by the Court on October 29, 1976, and the order was corrected and the Petitioner directed to serve his one year sentence in the Forrest County Jail located in Hattiesburg, Mississippi, as the Court had verbally stated at the sentencing hearing on May 21, 1976. Thus, the sentence of the petitioner was not final until October 29, 1976, when the corrected sentencing order was placed on the Minutes of the Court. The Notice of Appeal was filed on October 29, 1976, but inadvertently stated the May 21, 1976, date as date of final sentencing.

The United States District Court of Appeals for the Fifth Circuit was made aware of the above series of events by argument made in the Petition for Rehearing en banc filed before the Court. The Court of Appeals still refused to hear the petitioner's original appeal, and, thus, the petitioner has taken his appeal to the United States Supreme Court. It is respectfully submitted that this Court has jurisdiction to review on Writ of Certiorari the issues presented the United States Court of Appeals for the Fifth Circuit in the Petitioner's appeal to that Court. The United States Supreme Court has jurisdiction to grant a Writ of Certiorari to review the action of the Court of Appeals in declining his appeal to it, and if the Supreme Court determines that the Court of Appeals abused its discretion in refusing to allow the appeal, the review of the Supreme Court extends to the question on the merits sought to be raised by appeal. *House v. Mayo*, 324 U.S. 42, 89 L. Ed. 739, 65 SCR 517 (1945). The

Petitioner urges this Court to review on Writ of Certiorari the substantial constitutional questions presented below.

II.

The District Judge Of The United States District Court For The Southern District Of Mississippi Specified The Particular Place Of Confinement Of The Petitioner In Violation Of The Fifth And Fourteenth Amendments To The Constitution Of The United States Which Guarantee Due Process And Equal Protection Under The Law.

At the hearing on the Petitioner's Motion to Defer, Correct or Reconsider sentencing by the United States District Court for the Southern District on October 29, 1976, the United States District Judge stated that it was his intention that the Petitioner serve his one year sentence in the Forrest County, Mississippi, Jail located in Hattiesburg, Mississippi.

In *Larious v. Madigan*, 299 F. 2d 98, 100 (C.A. Wash. 1962), the Court stated as follows: "This Court has long held that it is beyond the authority of the sentencing Judge to order where the Defendant shall be confined". In *Larious v. Madigan*, the Court further stated, "Under 18 U.S.C., Section 4082, the designation of federal confinement for one convicted of a crime is a matter within the exclusive authority of the Attorney General of the United States".

In *Hogue v. United States*, 287 F. 2d 99 (C.A. Tex. 1961), the Fifth Circuit held, "It is up to the Attorney General to designate the institution where the offender may be held".

The due process and equal protection requirement of the Fifth and Fourteenth Amendments of the Constitution of the United States require the Petitioner be sentenced as any other person convicted of a crime in a United States District Court. The Order directing the Petitioner to be confined in the Forrest County, Mississippi, Jail reflects the intention by the lower Court to preempt the authority of the Attorney General and to in effect, make a special sentence and punishment for this Defendant in violation of his constitutional rights of due process and equal protection.

If this Court upholds the United States District Judge's order in regard to specification of place of sentencing, the system of federal control of prisoners and confinements would shortly be in disarray. If the Court determines the United States District Judge has authority to specify the place of confinement of a person convicted on a federal charge, then state officials will unnecessarily have to contend with the confinement to their facilities of persons who have not been convicted in local or state courts. The overall effect would be a disorganization of our present system and not reorganization as has been sought by recent legislation such as 18 U.S.C. 4201, et seq.

III.

The Sentence Imposed By The United States District Court For The Southern District Of Mississippi Has An Ex Post Facto Effect In Violation Of Article I, Section IX, Paragraph III Of The Constitution Of The United States. Specifically, The Petitioner Was Sentenced Under The Provisions Of The Parole And Re-

organization Act, 18 U.S.C. 4205, Which Became Effective May 14, 1976, And Which Became Effective After The Commission Of The Offense, Indictment And Plea Of The Petitioner In The United States District Court.

Under the law in effect at the time of the offense, indictment and plea of the petitioner in this case, the petitioner would have been eligible for parole after serving one-third of his one year sentence less good time. Under the provisions of the Parole and Reorganization Act, 18 U.S.C. 4205(f), and as a result of the rulings of the United States District Court for the Southern District of Mississippi, the Petitioner will be required to serve the entire one year period or three times the amount of time under the law in effect at the time of the commission of the offense, indictment of the federal grand jury, and acceptance of the Petitioner's plea by the United States District Court as previously set forth. The Parole and Reorganization Act went into effect on May 14, 1976, and the Petitioner was sentenced on May 21, 1976; thus, the petitioner is being sentenced under an Act which became effective only seven days prior to formal sentencing.

The question thus presented is whether the Petitioner has been subjected or has otherwise suffered an ex post facto effect as a result of the District Court's ruling in regard to his one year sentence. 16 Am Jur 2d, Constitutional Law, Section 396, defines as follows ex post facto laws:

> (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes

> such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflects a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

Section 396 further states that ex post facto effect can be defined as "one which in its operations, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. In present case, the petitioner has suffered an ex post facto effect as a result of the District Court's ruling that he be sentenced under the provisions of the Parole and Reorganization Act, and that he must serve the entire year, his punishment has increased from the possibility of parole after a one-third of his sentence under the old law, and consequently his situation has been altered to his detriment.

As further stated in 16 Am Jur 2d, Constitutional Law, Section 402, "the punishment may be lessened but never increased, as against anyone for a crime already committed, and statutes which aggravate the punishment come within the prohibition as to ex post facto laws."

It is respectfully submitted unto the Court that the petitioner has suffered an ex post facto effect by being

required to serve the entire year under the provisions of the Parole and Reorganization Act and not being eligible for parole after serving one-third of his sentence as he would have been entitled to under the laws existing at the time of the commission of the crime, indictment and plea.

CONCLUSION

Wherefore, it is respectfully submitted that this Court should grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals.

Respectfully Submitted:

BOYCE HOLLEMAN,
Attorney and Counsellor at Law
1913 Fifteenth Street
Post Office Drawer 1030
Gulfport, Mississippi 39501

Attorney for Petitioner

CERTIFICATE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid true and correct copies of the foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D. C. 20530, and to Honorable Robert E. Hauberg, United States Attorney, Post Office Box 2091, Jackson, Mississippi 39205.

THIS, the ____ day of September, A.D., 1977.

OF COUNSEL

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 16, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-4003 — U.S.A. v. J. NORTON HAAS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing on behalf of appellant, J. Norton Haas, Jr., and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Mr. Clarence Scales
Mr. Boyce Holleman
Messrs. Robert E. Hauberg
E. Donald Strange

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1976

No. 76-4003
Summary Calendar

D. C. Docket No. CR-S75-8(C)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

J. NORTON HAAS, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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Before THORNBERRY, RONEY and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed.

April 26, 1977

Issued as Mandate: AUG. 24, 1977

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4003

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

J. NORTON HAAS, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/ PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

[Filed: Aug. 24, 1977]

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

No. 77-459

In the Supreme Court of the United States

OCTOBER TERM, 1977

J. NORTON HAAS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-459

J. NORTON HASS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On April 5, 1976, petitioner pleaded guilty in the United States District Court for the Southern District of Mississippi to having conspired to misapply funds not in excess of $100 belonging to a federally insured savings and loan institution, in violation of 18 U.S.C. 371 and 656. On May 21, 1976, petitioner was sentenced to one year's imprisonment and was fined $1,000. The district court stated that petitioner should serve his sentence at the Forrest County Jail, a federally approved detention facility located in Hattiesburg, Mississippi. The written judgment and commitment order, entered on the same date, recited the same sentence except that it recommended that petitioner serve his sentence at the Madison County Jail in Mississippi, also a federally approved facility.

At the time of petitioner's guilty plea, 18 U.S.C. (1970 ed.) 4202 provided that, in general, a federal prisoner became eligible for parole after having served one-third of his term of imprisonment. On May 14, 1976, however, a week before petitioner was sentenced, the Parole Commission and Reorganization Act (Pub. L. 94-233, 90 Stat. 219 *et seq.*, 18 U.S.C. 4201 *et seq.*) became effective. Section 4205 of the Act (18 U.S.C. 4205), which replaced former 18 U.S.C. 4202, provides that "[a]ny prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, *unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms* * * *" (emphasis added).

On September 3, 1976, petitioner filed a motion to defer, correct, or reconsider sentence in the district court. He contended that because he had been sentenced under the new parole statute for conduct that had occurred before the statute took effect, the district court's failure to provide for his mandatory release on parole after service of one-third of his prison sentence had, in effect, stripped him of the parole eligibility that he would have enjoyed under the former statute and constituted an *ex post facto* application of the revised parole provisions to him. At a hearing on October 29, 1976, the district court declined to declare petitioner eligible for parole upon expiration of one-third of his sentence; it did correct the discrepancy between the oral and written sentence by ordering that petitioner serve his sentence at the Forrest County Jail.

On that same date, petitioner filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. The notice stated that petitioner was appealing from the original judgment, which had been entered on May 21, 1976. Since the notice of appeal was therefore untimely on its face (Rule 4(b), Fed. R. App. P.), the court of appeals *sua sponte* dismissed the appeal as untimely filed (Pet. App. 2a-3a). Petitioner thereafter filed a petition for rehearing in the court of appeals, which was denied on August 16, 1977 (Pet. App. 1a). The petition for a writ of certiorari was not filed until September 22, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

DISCUSSION

Petitioner's notice of appeal was filed on October 29, more than ten days after the entry of the May 21 judgment that he designated as the one from which he was appealing. Accordingly, the notice was, on its face, out of time under Rule 4(b), Fed. R. App. P. The time limits of Rule 4(b) are jurisdictional.[2] Nevertheless, we do not believe that Rule 4(b) required the dismissal of this appeal, because, as a matter of substance, petitioner was seeking review of the October 29, 1976 order, and the notice was timely filed from that order. The October 29 order, which denied petitioner's motion to correct what he maintains was an illegal sentence (Fed. R. Crim. P. 35),

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[1]On October 5, 1977, Mr. Justice Powell granted petitioner's application for stay of the mandate of the court of appeals pending the filing of his petition for certiorari.

[2]See *United States* v. *Robinson*, 361 U.S. 220, 229; *United States* v. *June*, 503 F. 2d 442, 443 (C.A. 8); cf. *Durham* v. *United States*, 400 F. 2d 879, 880 (C.A. 10), certiorari denied, 394 U.S. 932; *United States* v. *Smith*, 331 U.S. 469, 472-477.

was an appealable order, and it was the legality of the sentence and not the validity of the judgment of conviction that petitioner sought to have reviewed on appeal.

The principal purposes of the notice requirement and time limitations in Rule 4(b) are to inform other parties of an appellants' intention to appeal and to prevent dilatory tactics that might prejudice the appellee or otherwise hinder effective appellate review. Neither of these considerations requires the dismissal of the appeal in this case. The fact the government was in no way misled by the misdesignation is evidenced by its filing in the court of appeals of a brief on the merits (with no reference to the jurisdictional issue) that concludes (p. 7), "the trial Court's order of October 29, 1976 * * * should be affirmed * * *." Petitioner's counsel made good faith efforts to perfect an appeal, but he inadvertently misdesignated the order from which the appeal was taken. Petitioner was not dilatory; the notice of appeal was filed the same day that the district court denied his motion.

In this circumstance, the court of appeals should have treated the notice filed by petitioner as "an effective, although inept, attempt to appeal from the [October 29 order]." See *Foman* v. *Davis*, 371 U.S. 178, 181; 9 Moore, *Federal Practice*, par. 203.18 (1975 ed.) and cases there cited.

CONCLUSION

If the Court deems it appropriate to entertain the petition for a writ of certiorari even though it was filed out of time, the petition for a writ of certiorari should be granted, the judgment of the court of appeals dismissing the appeal should be reversed, and the case should be remanded to that court to consider the appeal on the merits.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

DOJ-1977-12